(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 798

HAROLD M. STEINER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITATIONS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Harold M. Steiner, by his counsel, Robert A. Grant, John Kitch, Don Kitch and Walter R. Arnold, respectfully petitions this Honorable Court to issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment entered in this cause by said Circuit Court on the 18th day of December, 1945, and in respect of which the said Circuit Court denied petitioner's petition for re-hearing on the 8th day of January, 1946.

Opinion Below.

The opinion of the Circuit Court of Appeals is annexed to the certified transcript of the record filed by petitioner herein. (R212)

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 18, 1945, and petitioner's petition for rehearing was filed therein within ten days thereafter, but denied by the said Circuit Court on the 8th day of January, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Sec. 347 (a)).

Question Presented.

The cardinal question presented is the correctness or error of the following assumption of prerogative in the trial of a criminal cause by the presiding Judge of the District Court for the Northern District of Indiana in relation to instructions to a jury, and approved by the Circuit Court of Appeals for the Seventh Circuit in affirming a judgment and sentence of petitioner, *i. e.*,

> In a criminal cause prosecuted by the United States before a jury for alleged violation of a maximum price regulation, where the charge against the defendant is a sale of a commodity, and the undisputed evidence discloses but a delivery of the commodity under a written contract of bailment, if the Trial Court and the Circuit Court of Appeals are convinced that it was the purpose of the defendant thus to evade a maximum price regulation by the written contract, it was proper for the Trial Court to instruct the jury as matter of law that the written contract of bailment did actually constitute a sale and was justified in declining to give to the jury, at the request of the defendant, the following instruction:
>
> > "If these contracts have been voluntarily executed by the parties whose signatures they bear, and as between them there was no extraneous understanding or agreement to nullify any provision

expressed in the instrument, the transaction evidenced thereby is a lease of the chattel and not its sale."

The critical question is this: Where the presiding judge in a criminal cause tried to a jury is convinced that a written contract is not meant by the parties thereto to be what it purports to be—a legitimate agreement of bailment—the trial judge has the right to assume it was meant to conceal an unlawful sale, as charged in the indictment, and to give to the jury a binding instruction to that effect and to refuse to give to the jury an instruction, requested by the defendant, that if the instrument correctly recites what the parties thereto agreed upon it is to be given that effect. Concretely stated and applied to the facts in this cause, as it was to petitioner's injury, the facts leading to the exercise of this unconstitutional action may be summarized as follows:

(a) The Price Control Act of 1942, (Chapter 26, 56 Stat. 23, Sec. 4 (a)), prohibited and penalized any person who *sold* or delivered any commodity in violation of any regulation or order of the Price Administrator.

(b) The Price Administrator promulgated a regulation (MPR 133) fixing "ceiling" *prices* on second-hand or used agricultural implements.

(c) The Price Administrator did not undertake in any manner to fix any "ceiling" *rentals* on agricultural implements, though he possessed the power to do so and, on the same day that he issued MPR 133, exercised that power in respect of many other implements. (MPR 134.)

(d) The petitioner, an auctioneer, offered to farmers being in need of such implements, to let to them such implements for a period of ten years, title to remain in the petitioner's principal, the owner, and to be returned at the expiration of the bailment, the person making the highest

bid for one year's hire to receive the bailment of the implement bid on. (R 21-37; R 44-86)

(e) The annual hire offered by the successful bailee, when multiplied by ten—the number of years expressed in the executed lease—exceeded the "ceiling" price for the implement established by MPR 133. (R 142-143)

(f) After the lease of the implement was struck off to the highest annual rental bidder, and before he received the article in his possession, a written contract of bailment was executed between himself and the owner whereby the implement was let unto the bailee for a period of ten years at an annual rental as bid, the whole of the rental for the entire term being paid at the time of execution of the instrument or before delivery of the implement. (R 131-133)

(g) The petitioner knew the terms of the contract of bailment and had provided the forms to the owner's clerk for use by the latter in consummation of the transaction. (R 120)

(h) The lease form was used only in such cases where the bids on the *sale* of the implement exceeded the ceiling price therefor fixed by MPR 133, and whenever that occurred in the course of a sale, the petitioner would cancel all bids for the purchase of the implement and proceed to offer the implement on a lease basis.

HELD: The presiding District Judge correctly drew the conclusion that the contract of bailment was designed as a subterfuge to evade the price regulation and correctly instructed the jury that the contract should be disregarded as a *bailment* of the implement, and the petitioner, as matter of law, should be held to its effect as a contract of *sale*, and there was no error on the part of the trial court to refuse to give to the jury, at the request of the petitioner, the tendered instruction above quoted. (R 218)

Statutes Involved.

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, Chapt. 26; 50 U. S. C. 902-924) and the relevant provisions of Maximum Price Regulation No. 133, are as follows:

"Whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of this Act, he may, by regulation or order, establish such maximum price or maximum prices as, in his judgment, will be generally fair and equitable and will effectuate the purposes of this Act. * * * As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect." (Chapter 26, 56 Stat. 23 Sec. 2 (a).)

"Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." (Sec. 2, sub-section (g) Chapter 26, 56 Stat. 23.)

"It shall be unlawful * * * for any person to sell or deliver any commodity * * * or otherwise to do or omit to do any act in violation of any regulation or order under Section 2, * * * or to offer, solicit, attempt, or agree to do any of the foregoing." (Chapter 26, 56 Stat. 23, Sec. 4 (a).)

"Nothing in this Act shall be construed to require any person to sell any commodity * * *." (Chapter 26, 56 Stat. 23, Sec. 4 (d).)

"Any person who willfully violates any provision of Section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000.00 or to imprisonment for not more than * * * one year * * * or to both such fine and imprisonment." (Chapter 26, 56 Stat. 23, Sec. 205 (b).)

Applicable Parts of Maximum Price Regulation No. 133.

"1361.3a. Maximum prices for used equipment—(a) Applicability of this section. This section is applicable to sales by all persons of the following items of used farm equipment:

(1) Combines.
(2) Corn binders.
(3) Corn pickers.
(4) Farm tractors (except crawler tractors).
(5) Hay balers (motor or tractor operated).
(6) Hay loaders.
(7) Manure spreaders.
(8) Side delivery rakes.
(9) A combination of any of the items just listed with other items of farm equipment specifically designed for mounting thereon, where the combination is sold as a unit.

This section is also applicable to sales by retail dealers of any complete item of used farm equipment. This section is not applicable to sales of used farm equipment parts.

(b) Maximum prices for sales by farmers, auctioneers, etc. The maximum price for a sale by a person, other than a retail dealer, of any item listed in sub-paragraphs (1) to (8), inclusive, of paragraph (a), shall be determined as follows: If the item is sold within one year after sale new, the maximum price shall be 85% of the 'base price'. In any other case, the maximum price shall be 70% of the 'base price'. In the case of a combination sale referred to in paragraph (a) (9), the maximum price for the combination shall be equal to the sum of the maximum prices of each of the items of farm equipment sold as a part of the combination. These maximum prices shall be determined in the manner just set forth.

(1) Base Price. The 'base price' which must be used in determining maximum prices shall be the first of the following which is available:

(i) The manufacturer's current suggested retail price for the item.

(ii) The last suggested retail price for the item that the manufacturer issued.

(iii) If the item never had a suggested retail price, the base price is the maximum price for which the same or nearest equivalent item would be sold new in the locality, minus carload freight from the plant or manufacturer of the item."

STATEMENT.

Petitioner was indicted under seventeen separate counts of an indictment, each charging a distinct "sale", in violation of MPR 133, of a particularly described farm implement to a specified "purchaser" at a specified "price". He was found guilty on each of fifteen counts and sentenced to the custody of the Attorney General for a period of one year on each of eight counts (sentences to run concurrently) and to make his fine in the total sum of $1,600.00 on said eight counts, and to six months on each of the other seven counts and to make his fine thereon in the amount of $1,400.00.

The relevant evidence at the trial was undisputed as to each of the fifteen counts, *i. e.*, that in each instance there was no sale of any property, but the petitioner, as auctioneer, offered the implement for rent for a period of ten years, and announced that the bidder making the highest bid for the rental for one year would enter into a lease agreement with the owner through the owner's clerk. In each instance the successful bidder, fully understanding that he was not purchasing the implement but merely acquiring a bailment thereof, would repair to the clerk after making his successful bid, and with the clerk transact the remainder of the business. A written contract of bailment was then executed between the bailee and the owner through the clerk to the following tenor:

"LEASE OF EQUIPMENT.

The undersigned _____, hereinafter designated as 'the lessor' has let unto the undersigned _____, hereinafter designated 'the lessee' the following agricultural tools, machinery and equipment:

_____

1. The term of this lease is 10 years at an annual rental of ..... Dollars, a total rental of ..... Dollars. Of this amount the lessee has paid to the lessor ..... Dollars, to leave a balanec of no/100 Dollars owing on the rental for the remainder of the term. This balance shall be paid to the lessor in equal annual installments at the annual rate aforesaid, in advance, the first payment on this balance to be made on that anniversary date of this lease constituting the end of the period for which the advance rental payment has been this day paid to the lessor. If the lessee shall fail to pay the same when so due, the lessor shall resort to the deposit described in the next succeeding paragraph of this lease and draw thereon for the rental so falling due, and from year to year thereafter (in event of such continued non-payment) until the expiration of this lease.

2. The lessee has deposited with the lessor the sum of ..... Dollars as security for the payment of the balance of the rentals herein called for and as security for the return, at the end of the term of this demise, of the chattels aforesaid, in as good a condition as they now are in, in full repair and state of efficient operability. The lessee undertakes, unconditionally and without exceptions, for himself, successors and assigns, the return of the chattels to the lessor in the condition aforesaid at the end of the demise. Provided, However, in no event shall the said lessee, his heirs, executors, administrators, assigns and successors be holden to any liability for breach of this covenant or any other provision of this lease in excess of the amount of deposit for security, as in this paragraph specified. Provided, Further, However, in event the deposit aforesaid or any part thereof of the advance rental payment or any part thereof is not paid in cash but evidenced by a promissory note or notes accepted by the lessor, nothing herein contained shall operate as any defense to, set off or counterclaim against or furnish any ground for postponement

of the maturity date fixed by such note or notes, and such note or notes shall be collectible in accordance with their tenor, wholly apart from and without regard to any limitation of liability on the lessee as herein expressed.

3. The lesese shall list the chattels as his property for taxation and pay and discharge when due any and all taxes and other governmental excises and exactions whatsoever on account of the ownership, operation, or this bailment of the said chattels, and hereby indemnifies and agrees to hold the lessor harmless therefrom.

4. The lessee may assign this lease, or sublet the chattels, but with such assignment shall pass to the assignee's debt account security all deposits made with the lessor, and such assignee shall then, without diminution of obligation, stand in the shoes of the lessee, and likewise every subsequent sublessee and assignee thereof. Should the lessee or his assigns at any time undertake to make disposition of the chattels, the purchaser in good faith shall, notwithstanding any lack of consent on the part of the lessor, take good title thereto as against the lessor, and the lessor shall then be entitled to full appropriation of the deposit for security in like manner as on the destruction of the chattels, and any unearned rentals in the hands of the lessor shall be deemed then fully earned.

5. No guarantees, representations or warranties whatsoever are made by the lessor to the lessee in relation to the chattels hereby let, it being understood that the lessee has examined the same and knows their character and quality.

Executed at ....., Indiana, this .....
day of ....., 194....

.....

Lessor.

(R131-133)

.....

Lessee."

In the blank spaces would be inserted the appropriate names of the bailor and bailee, respectively, the annual rental, the aggregate rental, the amount of the "deposit", the place of execution of the contract, the date of execution and the subscribing signatures of the respective parties, in the order as the blanks appear. In relation to the facts charged in two or three of the counts of the indictment the evidence disclosed that there were obvious errors of the scrivener in filling these blanks, but in every instance the intent of the successful bidder to acquire but a bailment and not title to the article described in the apropos count of the indictment is undisputed. (R 21-37; R 44-86)

The petitioner, at the conclusion of the evidence, requested that the Court direct the jury to find the petitioner not guilty. This the trial court refused to do, and petitioner excepted. The trial court, referring to the executed written instruments, instructed the jury as follows:

> "There have been admitted into evidence certain instruments which bear the heading, 'Lease of Equipment'. They are exhibits and will be taken by you to the jury room. It is my duty, as part of these instructions to you, to construe these instruments—I shall say to you now that counsel have stated that they are all identical—that is, it is my duty to inform you as to the meaning as a matter of law of these written instruments called 'Leases', or 'Leases of Equipment'.
>
> Therefore, I instruct you that these instruments are not to be construed as or to be given the legal effect of a lease in fact, regardless of the fact that the people who signed them are designated 'Lessor' or 'Lessee'." (R170)

The petitioner excepted to the charge.

The trial court further instructed the jury, in respect to said written instruments:

> "You are further instructed that in such instance these instruments, in and of themselves, do not constitute a defense to the violations charged in the various counts of the indictment." (R170)

The petitioner requested the trial court to instruct the jury with respect to said written instruments

> "the forms so executed constitute leases of personal property," (R179)

which instruction the trial court refused to give to the jury and petitioner excepted.

Further, the petitioner requested the trial court to give to the jury, as part of its charge in respect to said contracts:

> "If these contracts have been voluntarily executed by the parties whose signatures they bear, and as between them there was no extraneous understanding or agreement to nullify any provision expressed in the instrument, the transaction evidenced thereby is a lease of the chattel and not its sale," (R179)

but the trial court declined to give this charge and the petitioner excepted.

The trial court did not give any instructions to the jury embodying the substance of any of these requests.

The Circuit Court of Appeals, in and for the Seventh Circuit, declined to disturb the judgment and sentence holding:

> "The court correctly construed the instrument, and no error was committed in giving the above instruction." (R218)

The Circuit Court of Appeals disregarded the assigned errors on the part of the petitioner in respect to the refusal of the trial court to give the above quoted instructions so tendered by the petitioner.

Reasons for Granting the Writ.

Petitioner believes the record in this cause, on the basis of the foregoing statement of the material parts thereof, sufficiently invokes the intervention of this Court to annul a judgment of the Circuit Court of Appeals for the Sev-

enth Circuit as having sanctioned what is probably so far a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision of the Supreme Court of the United States as envisaged by Rule 38, Section 5, subsection (b), of the Rules of this Court. The petitioner contends that such action on the part of the trial judge, so acquiesced in by the Circuit Court of Appeals has deprived petitioner of a constitutional trial by jury, the presiding trial judge having substituted his own conclusions of fact and, in effect, directed the jury to shape its verdict in accordance with such conclusion of the presiding judge, when petitioner was constitutionally entitled to have the jury pass on the question of intent and purpose of the petitioner, and whether the parties intended a transaction to accord with the recitals of the instrument they executed, and petitioner asks this Court to refer to the brief of petitioner annexed hereto as appendix in support of petitioner's position.

It is respectfully submitted that this petition for writ of certiorari should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1945.

No.....

HAROLD M. STEINER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ERROR RELIED ON.

The United States Circuit Court of Appeals for the Seventh Circuit erred in holding that in a criminal cause prosecuted by the United States before a jury, for alleged violation of a maximum price regulation, where the charge against the defendant is a sale of a commodity, and the undisputed evidence discloses but a delivery of the commodity under a written contract of bailment, if the Trial Court and the Circuit Court of Appeals are convinced that

it was the purpose of the defendant thus to evade a maximum price regulation by the written contract, it was proper for the Trial Court to instruct the jury, as a matter of law, that the written contract of bailment did actually constitute a sale, and was justified in declining to give to the jury, at the request of the defendant, the following instruction:

> "If these contracts have been voluntarily executed by the parties whose signatures they bear, and as between them there was no extraneous understanding or agreement to nullify any provision expressed in the instrument, the transaction evidenced thereby is a lease of the chattel and not its sale."

ARGUMENT.

The instructions quoted in the petition herein, in the face of the refusal of the trial court to give those tendered and requested by the petitioner as in the petition quoted, are essentially more prejudicial than those of similar tenor in criminal cases often condemned by this Court as deprivative of the constitutional rights of the defendant. In *Chaffee, et al.*, v. *U. S.*, 85 U. S. (18 Wall) 516, 21 L. ed. 908, the court instructed that the United States had made a *prima facie* case and it devolved upon the defendants to give exculpatory explanation of that case, otherwise guilt had been established. This Court said of that instruction (loc. cit. p. 546):

> "The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction."

Here the trial court went even further by declaring of the contracts of bailment, as matter of law:

> "These instruments are not to be construed as or to be given the legal effect of a lease in fact, regardless of the fact that the people who signed them are designated 'lessor' or 'lessee',"

and

> "These instruments, in and of themselves, do not constitute a defense to the violations charged in the various counts of the indictment,"

thus even withdrawing from the jury's consideration the question of whether the parties did or did not intend to make a contract of bailment, and, in effect, declaring that,

in the circumstances, the jury must find that they intended a sale in violation of law.

Less constraining upon the jury was the instruction condemned by this Court in *Quercia* v. *U. S.*, 289 U. S. 466 (loc. cit. 472), 77 L. ed. 1321, where the trial court made a specific statement of fact derogatory of the defendant's testimony and later advised the jury that it was but the opinion of the judge with which they were not bound to coincide. But this Court said:

> "His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence."

Here the court made the derogatory statement not as one of fact, but the jury were directed to take it as a positive pronouncement of the law, positively binding upon them.

The suggestion by the Circuit Court of Appeals that the following instruction given by the trial court at defendant's request probably cured any harm that might have otherwise resulted, *i. e.*,

> "While a deceitful contrivance or fraudulent device to evade the provisions of a lawful regulation may not be legally resorted to for effective accomplishment of the evasion, yet if the defendant, in good faith, conscientiously believed that he was not violating the law in anything that he did do or failed to do as shown by the evidence, he is not guilty of willfully violating the regulation. This is true notwithstanding his act or omission may, as a matter of law, constitute an evasion of the provisions of a regulation,"

does not appear tenable, especially when the District Judge, in the hearing of the jury, refused petitioner's request to instruct the jury thus:

> "If these contracts have been voluntarily executed

by the parties whose signatures they bear, and as between them there was no extraneous understanding or agreement to nullify any provision expressed in the instrument, the transaction evidenced thereby is a lease of the chattels and not its sale,".

Petitioner earnestly contends that to hold, in the light of the record herein, that the trial court was correct in exercising the unprecedented prerogative of appraising the evidence as being so strongly against the petitioner as, in effect, to declare him guilty as matter of law, leaving only to the jury the formal memorialization of that dictum by subscribing a verdict, will be tantamount to a judicial repeal of the Sixth Amendment to our Constitution, and a denial of the writ in this instance, will stand as *prima facie* sanction to that result. Petitioner believes the writ should be ordered to issue as prayed.

Respectfully submitted,

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Walter R. Arnold,
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South Bend, Indiana.

Dated:
South Bend, Indiana,
February 2, 1946.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Jonas A. Miller, by his counsel, Robert A. Grant, Walter R. Arnold and Charles W. Davis, respectfully petitions this Honorable Court to issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment entered in this cause by said Circuit Court on the 18th day of December, 1945, and in respect of which the said Circuit Court denied petitioner's petition for rehearing on the 8th day of January, 1946.

Opinion Below.

The opinion of the Circuit Court of Appeals is annexed to the certified transcript of the record filed by petitioner herein. (R188)

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 18, 1945, and petitioner's petition for re-hearing was filed therein within ten days thereafter, but denied by the said Circuit Court on the 8th day of January, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C. Sec. 347 (a)).

Question Presented.

The cardinal question presented is the correctness or error of the following postulate, assumed and followed in the trial by the District Court for the Northern District of Indiana in a criminal cause and, in effect, enunciated by the Circuit Court of Appeals for the Seventh Circuit in affirming a judgment and sentence of petitioner:

> Where a particular act is rendered criminal under a penal statute of the Congress, the doing of another act, not specifically denounced or prohibited, will be held within the intent of the statute and subject the actor to like punishment as if its commission were expressly prohibited and rendered punishable by the statute, if the act committed is calculated to produce the evil results which the Congress, by the statute, designed to avert.

The quintessential question is this: Are "constructive crimes" recognized under the Federal Criminal Code? Concretely stated and applied to this cause, as it was to petitioner's injury, it may be summarized as follows:

(a) The Price Control Act of 1942, (Chapter 26, 56 Stat. 23, Sec. 4 (a)), prohibited the sale of and penalized any person who sold or delivered any commodity in violation of any regulation or order of the Price Administrator.

(b) The Price Administrator promulgated a regulation (MPR 133) fixing "ceiling" *prices* on second-hand or used agricultural implements.

(c) The Price Administrator did not undertake in any manner to fix any "ceiling" *rentals* on agricultural implements, though he possessed the power to do so and, on the same day that he issued MPR 133, exercised that power in respect of many other implements. (MPR 134).

(d) The petitioner, an auctioneer, offered to farmers being in need of such implements, to let to them such implements for a period of ten years, title to remain in the petitioner's principal, the owner, and to be returned at the expiration of the bailment, the person making the highest bid for one year's hire to receive the bailment of the implement bid on. (R 20-41; R46-80; R82-90)

(e) The annual hire offered by the successful bailee, when multiplied by ten—the number of years expressed in the executed lease—exceeded the "ceiling" price for the implement established by MPR 133. (R130-131)

(f) The petitioner did not settle the terms of the lease or participate in its execution nor in the receipt of any of the consideration paid by the bailee, though he did furnish blank contract forms to the owner's clerk before the auction, but at the auction petitioner's functions ended when he announced acceptance on behalf of the owner, of the highest *annual* rent offered, which in each instance was less than the "ceiling" price fixed by MPR 133. (R118)

(g) The owner's clerk, over whom the petitioner had no control, on behalf of the owner, in each instance, exacted from the bailee not only the payment of one year's rental, but required and received payment by the bailee of the aggregate hire for the whole period of bailment to be paid in advance before delivery of the implement. (R113-114)

HELD: Sufficient to establish the guilt of the petitioner under the charge that he

> "did unlawfully, willfully and knowingly agree, solicit and offer to sell and did sell and deliver"

the implement in violation of MPR 133. (R153)

Statutes Involved.

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, Chapt. 26; 50 U.S.C. 902-924) and the relevant provisions of Maximum Price Regulation No. 133, are as follows:

> "Whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may, by regulation or order, establish such maximum price or maximum prices as, in his judgment, will be generally fair and equitable and will effectuate the purposes of this Act. * * * As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect." (Chapter 26, 56 Stat. 23 Sec. 2 (a).)
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> "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." (Sec. 2, sub-section (g) Chapter 26, 56 Stat. 23.)
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> "It shall be unlawful * * * for any person to sell or deliver any commodity * * * or otherwise to do or omit to do any act in violation of any regulation or order under Section 2, * * * or to offer, solicit, attempt, or agree to do any of the foregoing." (Chapter 26, 56 Stat. 23, Sec. 4 (a).)
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> "Nothing in this Act shall be construed to require any person to sell any commodity * * *." (Chapter 26, 56 Stat. 23, Sec. 4 (d).)
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> "Any person who willfully violates any provision of Section 4 of this Act * * * shall, upon conviction

thereof, be subject to a fine of not more than $5,000.00 or to imprisonment for not more than * * * one year * * * or to both such fine and imprisonment." (Chapter 26, 56 Stat. 23, Sec. 205 (b).)

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(7) Manure spreaders.
(8) Side delivery rakes.
(9) A combination of any of the items just listed with other items of farm equipment specifically designed for mounting thereon, where the combination is sold as a unit.

This section is also applicable to sales by retail dealers of any complete item of used farm equipment. This section is not applicable to sales of used farm equipment parts.

(b) Maximum prices for sales by farmers, auctioneers, etc. The maximum price for a sale by a person, other than a retail dealer, of any item listed in sub-paragraphs (1) to (8), inclusive, of paragraph (a), shall be determined as follows: If the item is sold within one year after sale new, the maximum price shall be 85% of the 'base price'. In any other case, the maximum price shall be 70% of the 'base price'. In the case of a combination sale referred to in paragraph (a) (9), the maximum price for the combination shall be equal to the sum of the maximum prices of each of the items of farm equipment sold as a part of the combination. These maximum prices shall be determined in the manner just set forth.

(I) Base Price. The 'base price' which must be used in determining maximum prices shall be the first of the following which is available:

(i) The manufacturer's current suggested retail price for the item.

(ii) The last suggested retail price for the item that the manufacturer issued.

(iii) If the item never had a suggested retail price, the base price is the maximum price for which the same or nearest equivalent item would be sold new in the locality, minus carload freight from the plant of manufacturer of the item."

STATEMENT.

Petitioner was indicted under twelve separate counts of an indictment, each charging a distinct "sale", in violation of MPR 133, of a particularly described farm implement to a specified "purchaser" at a specified "price". He was found guilty on each count and sentenced to the custody of the Attorney General for a period of one year on each count (sentences to run concurrently) and to make his fine in the total sum of $3,000.00.

The relevant evidence at the trial was undisputed as to each of the twelve counts, *i. e.*, that in each instance there was no sale of any property, but the petitioner, as auctioneer, offered the implement for rent for a period of ten years, and announced that the bidder making the highest bid for the rental for one year would enter into a lease agreement with the owner through the owner's Clerk. In each instance the successful bidder, fully understanding that he was not purchasing the implement but merely acquiring a bailment thereof, would repair to the clerk after making his successful bid, and with the clerk transact the remainder of the business. A written contract of bailment was then executed between the bailee and the owner through the clerk to the following tenor:

"LEASE OF EQUIPMENT.

The undersigned ....., hereinafter designated as 'the lessor' has let unto the undersigned ....., hereinafter designated 'the lessee' the following agricultural tools, machinery and equipment:

.....

1. The term of this lease is 10 years at an annual rental of ..... Dollars, a total rental of..... Dollars. Of this amount the lessee has paid to the lessor ..... Dollars, to leave a balance of no/100 Dollars owing on the rental for the remainder of the term. This balance shall be paid to the lessor in equal annual installments at the annual rate aforesaid, in advance, the first payment on this balance to be made on that anniversary date of this lease constituting the end of the period for which the advance rental payment has been this day paid to the lessor. If the lessee shall fail to pay the same when so due, the lessor shall resort to the deposit described in the next succeeding paragraph of this lease and draw thereon for the rental so falling due, and from year to year thereafter (in event of such continued non-payment) until the expiration of this lease.

2. The lessee has deposited with the lessor the sum of ..... Dollars as security for the payment of the balance of the rentals herein called for and as security for the return, at the end of the term of this demise, of the chattels aforesaid, in as good a condition as they now are in, in full repair and state of efficient operability. The lessee undertakes, unconditionally and without exceptions, for himself, successors and assigns, the return of the chattels to the lessor in the condition aforesaid at the end of the demise. Provided, However, in no event shall the said lessee, his heirs, executors, administrators, assigns and successors be holden to any liability for breach of this covenant or any other provision of this lease in excess of the amount of deposit for security, as in this paragraph specified. Provided, Further, However, in event the deposit aforesaid or any part thereof of the advance rental payment or any part thereof is not paid in cash but evidenced by a promissory note or notes accepted by the lessor, nothing herein contained shall operate as any defense to, set off or counterclaim against or furnish any ground for postponement of the maturity date fixed by such note or notes,

and such note or notes shall be collectible in accordance with their tenor, wholly apart from and without regard to any limitation of liability on the lessee as herein expressed.

3. The lessee shall list the chattels as his property for taxation and pay and discharge when due any and all taxes and other governmental excises and exactions whatsoever on account of the ownership, operation, or this bailment of the said chattels, and hereby indemnifies and agrees to hold the lessor harmless therefrom.

4. The lessee may assign this lease, or sublet the chattels, but with such assignment shall pass to the assignee's debt account security all deposits made with the lessor, and such assignee shall then, without diminution of obligation, stand in the shoes of the lessee, and likewise every subsequent sublessee and assignee thereof. Should the lessee or his assigns at any time undertake to make disposition of the chattels, the purchaser in good faith shall, notwithstanding any lack of consent on the part of the lessor, take good title thereto as against the lessor, and the lessor shall then be entitled to full appropriation of the deposit for security in like manner as on the destruction of the chattels, and any unearned rentals in the hands of the lessor shall be deemed then fully earned.

5. No guarantees, representations or warranties whatsoever are made by the lessor to the lessee in relation to the chattels hereby let, it being understood that the lessee has examined the same and knows their character and quality.

Executed at ....., Indiana, this ..... day of ....., 194.....

.....

Lessor

(R80-81)

.....

Lessee."

In the blank spaces would be inserted the appropriate names of the bailor and bailee, respectively, the annual rental, the aggregate rental, the amount of the "deposit", the place of execution of the contract, the date of execution and the subscribing signatures of the respective parties, in the order as the blanks appear. In relation to the facts charged in two or three of the counts of the indictment the evidence disclosed that there were obvious errors of the scrivener in filling these blanks, but in every instance the intent of the successful bidder to acquire but a bailment and not title to the article described in the apropos count of the indictment is undisputed. (R20- R90; R101-11

The petitioner, at the conclusion of the evidence, requested that the Court direct the jury to find the petitioner not guilty. This the trial court refused to do and petitioner excepted. The petitioner also requested the court to instruct the jury as follows:

> "If the defendant with that purpose and intent, leased, offered to lease, or solicited bids for leasing, the several items of farm machinery described in the several counts of the indictment, and did not offer them for sale, solicit bids for their sale, or make sale there, then he has committed no crime." (R154)

which instruction the trial court refused to give and the petitioner excepted. The petitioner also requested as part of the charge, that the court give the following instruction:

> "There was not in effect, at the time of the alleged offenses charged in the several counts of the indictment herein, any regulation of the Price Administrator governing the maximum rental that shall be charged for the leasing of any of the items of farm equipment described in the indictment." (R155)

This instruction the court refused to give to the jury and the petitioner excepted. The trial court did not give any

instructions to the jury embodying the substance of any of these requests. The Circuit Court of Appeals in and for the Seventh Circuit declined to disturb the judgment and sentence holding,

> "If the purported lease was simply a vehicle for the circumvention of the law, and the transaction was, in reality, a sale—not a lease—and the price received was over and above the maximum or ceiling price, then, such transaction would be in violation of the law and regulation if done knowingly, intentionally and willfully. It cannot be denied that the amount received by the owner of the implements—whether it be termed rental or sale price—was greatly in excess of the maximum or ceiling sale price of such implements. A careful examination of the 'lease' and of the evidence leaves no doubt that the transactions were a willful attempt upon the part of the defendants to circumvent and evade the law and regulation, that such transactions were outright sales, and not leases, and were in excess of the maximum or ceiling prices as fixed by the law and regulation." (R192 - R193)

Reasons for Granting the Writ.

Petitioner believes the record in this cause, on the basis of the foregoing statement thereof, adequately calls for the intervention of this court to annual a judgment of the Circuit Court of Appeals for the Seventh Circuit involving a federal question of criminal jurisprudence determined thereby in a way probably in conflict with the applicable decisions of this Court, as envisaged by Rule 38, section 5, sub-section (b) of the Rules of this Court, and petitioner asks this Court to refer to the brief of petitioner annexed hereto as appendix in support of petitioner's position.

It is respectfully submitted that this petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. _____

JONAS A. MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ERROR RELIED ON.

The United States Circuit Court of Appeals for the Seventh Circuit erred in holding that where a particular act is rendered criminal under a penal statute of the Congress, the doing of another act, not specifically denounced or prohibited, will be held within the intent of the statute and subject the actor to like punishment as if its commission were expressly prohibited and rendered punishable by the statute, if the act committed is calculated to produce the evil results which the Congress, by the statute, designed to avert. Specifically, in this case, that the act of petitioner in participating in the letting of a farm implement for a period of ten years, where the aggregate rental reserved exceeded the "ceiling" price on the article were it sold, is guilty of violation of the regulation which prohibits "sale" of the article above the stipulated limit.

ARGUMENT.

To demonstrate that the action of the District Court and the Circuit Court of Appeals on the question presented is in conflict with the consistent applicable decisions of this Court, petitioner needs but quote from Chief Justice Marshall's opinion in *United States* v. *Wiltberger,* (1820) 18 U. S. (5 Wheat.) 76, loc. cit. 96, 5 L. ed. 37, loc. cit. 42:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases";

and from the opinion by Mr. Justice Butler, in *Fasulo* v. *United States* (1926), 272 U.S. 620, loc. cit. 629, 71 L. ed. 443, loc. cit. 445:

> "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute";

and from *United States* v. *Resnick* (1936), 299 U.S. 208, loc. cit. 209, 81 L. ed. 127, loc. cit. 129:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used."

Never, so far as petitioner's counsel are advised, has this salutary principle of criminal justice been departed from by the decisions of this Court. Equally convinced is

petitioner that the action of the trial court and the judgment of the Circuit Court of Appeals in this case have set this principle at naught and that it should not be sanctioned or acquiesced in by denial of the petition herein filed.

Respectfully Submitted,

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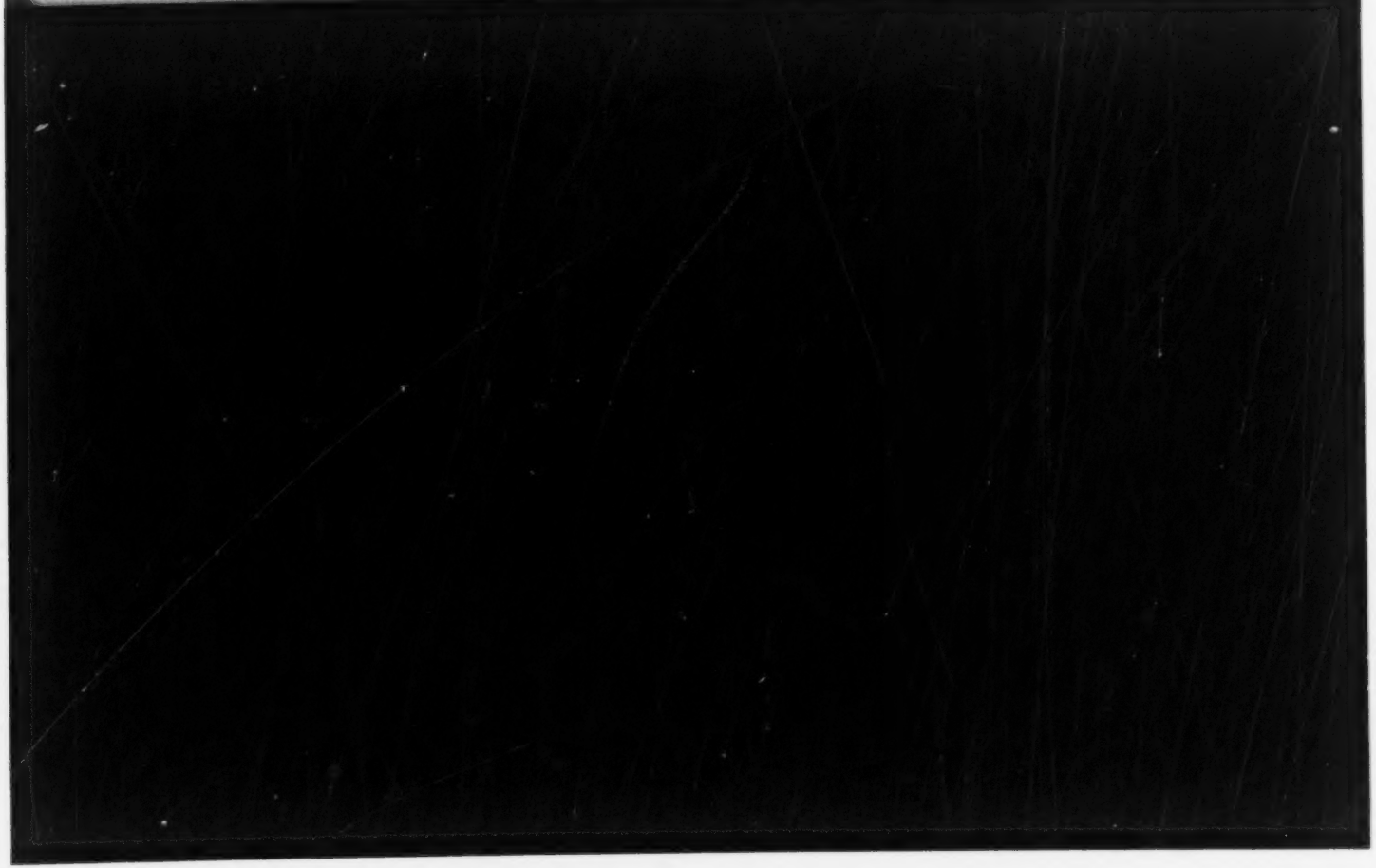

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 798

HAROLD M. STEINER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 799

JONAS A. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The appeals in these cases were heard together and were disposed of in one opinion in the circuit court of appeals (No. 798, R. 212–219; No. 799, R. 188–195), which is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered December 18, 1945 (No. 798, R. 220;

No. 799, R. 196), and petitions for rehearing were denied January 8, 1946 (No. 798, R. 221; No. 799, R. 197). The petitions for writs of certiorari were filed February 4, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The question presented is, in substance, whether the transactions in which petitioners engaged were sales or leases of farm equipment.

A subsidiary question is whether the trial judge erred in instructing the jury in each case that if they found that sales of the items in question took place, the "Lease of Equipment" contracts which petitioners used in auctioning farm machinery were not to be treated as leases, but rather as contracts of sale.

STATUTE AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 58 Stat. 632 (50 U. S. C. App., Supp. IV, 901 *et seq.*), provides in pertinent part:

> Sec. 2 (a). Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the

purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act. * * *

SEC. 4 (a). It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205 (b). Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment.

Maximum Price Regulation No. 133 (7 F. R. 3185), issued by the Price Administrator on April 28, 1942, provided in pertinent part as of the date of the offenses involved here:

SEC. 1361.1. Prohibition against sales at higher than maximum prices.

(a) On and after May 11, 1942, regardless of any contract, agreement, lease or other obligation:

(1) No person shall sell, deliver or negotiate the sale of any farm equipment at a price higher than the maximum fixed by this regulation;

(2) No person in the course of trade or business shall buy or receive any farm equipment at a price higher than the maximum fixed by this regulation; and

(3) No person shall agree, offer, solicit or attempt to do any of the foregoing.

* * * * *

SEC. 1361.3a. Maximum prices for used equipment—(a) *Applicability of this section.* This section is applicable to sales by all persons of the following items of used farm equipment:

(1) Combines.

(2) Corn binders.

(3) Corn pickers.

(4) Farm tractors and garden tractors (except truck-type tractors for which maximum prices are established by Maximum Price Regulation 136, as amended).

(5) Hay balers (motor or tractor operated).

(6) Hay loaders.

(7) Manure spreaders.

(8) Side delivery rakes.

(9) Tractor mounted mowers, including semi-mounted (power take-off driven) mowers.

(10) A combination of any of the items just listed with other items of farm equipment specifically designed for mounting thereon, where the combination is sold as a unit.

This section is also applicable to the sale of any complete item of farm equip-

ment which has been purchased or acquired by the seller for resale. This regulation is not applicable to sales of used farm equipment parts.

(b) *Maximum prices for sales by farmers, auctioneers, etc.*—The maximum price for the sale of any item listed in subparagraphs (1) to (9), inclusive, of this paragraph (a), which has been purchased or acquired by the seller for his own use and not for resale, shall be determined as follows: If the item is sold within one year after sale new, the maximum price shall be 85% of the "base price." In any other case, the maximum price shall be 70% of the "base price." In the case of a combination sale referred to in paragraph (a) (9), the maximum price for the combination shall be equal to the sum of the maximum prices of each of the items of farm equipment sold as a part of the combination. These maximum prices shall be determined in the manner just set forth.

(1) *Base price.*—The "base price" which must be used in determining maximum prices shall be the first of the following which is available:

(i) The manufacturer's current suggested retail price for the item * * *.

(ii) The last suggested retail price for the item that the manufacturer issued.

(iii) If the item never had a suggested retail price, the base price is the maximum price for which the same or nearest equiva-

lent item would be sold new in the locality, minus carload freight from the plant of the manufacturer of the item.

* * * * *

STATEMENT

Indictments were returned in the United States District Court for the Northern District of Indiana against petitioner Steiner in seventeen counts and against petitioner Miller in twelve counts, charging violations of the Emergency Price Control Act (No. 798, R. 1–14; No. 799, R. 1–10). Each count of the indictments charged that on a specified date the defendant, acting as an auctioneer at a public sale, wilfully sold a described item of farm machinery or equipment at a specified price which was substantially in excess of the ceiling price prescribed by Maximum Price Regulation No. 133. Petitioner Steiner was convicted after a jury trial on all except two counts (No. 798, R. 182), and he was sentenced to imprisonment for one year on each of counts 1, 2, 3, 4, 6, 7, 9, and 10, the sentences to run concurrently, and for six months on each of the remaining counts, the sentences to run concurrently as between themselves but consecutively to the sentences on the other counts; he was also fined $200 on each count (No. 798, R. 188–190). Petitioner Miller was convicted by a jury on all counts (No. 799, R. 158), and he was sentenced to imprisonment for one year on each of the first eleven

counts, the sentences to run concurrently, and to imprisonment for one day on count 12, to be served consecutively to the sentences on the other counts; he was also fined $250 on each count (No. 799, R. 196).

Upon appeals which were heard together and disposed of in a single opinion, the judgments were affirmed by the Circuit Court of Appeals for the Seventh Circuit (No. 798, R. 220; No. 799, R. 196).

There was no dispute at either trial that each of the items of farm equipment and machinery specified in the indictments was transferred at an auction sale at a total price substantially in excess of the price ceiling established by Maximum Price Regulation No. 133. The sole disputed question was whether petitioners had sold the items, as the Government claimed, or whether they had leased them for a rental which is not regulated by the Maximum Price Regulation, as petitioners claimed, and, in substance, it is this question which petitioners raise in this Court. (See No. 798, R. 214–215.) While petitioners had separate jury trials, the pattern of the evidence showing the transactions charged in each indictment is the same. The evidence, directed to the issue which petitioners raise, may be briefly summarized as follows:

For a number of years petitioners have conducted auctions at farm sales in Indiana (No.

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798, R. 106–107; No. 799, R. 110). When a farmer desires to dispose of his farm machinery and equipment and other assets by auction, he customarily announces publicly through a "sale-bill," which is distributed in the locality, that his property will be sold at auction under the auspices of named auctioneer (See, e. g., No. 799, R. 49–51, 91; see also pp. 23, 40).[1] Until January

[1] For example, Government Exhibit No. 22 in the *Miller* case, a "sale-bill," states (No. 799, R. 91):

"Public Sale.

"As I am quitting farming I will sell at Public Auction at my farm located 4½ miles southwest of Wakarusa or 1 mile north and ½ mile east of Oak Grove., on Wed., August 9, sale to begin at 1:00 P. M.

8 Guernsey Cattle: 4-yr. old cow bred July 10; 6-yr. old cow bred June 22; 6 yr. old cow bred May 28; heifer coming in with 2d calf Oct. 24; 3-yr. old cow bred June 21; Guernsey cow bred June 3; yearling heifer; 18-mo. old herd bull.

10 Head Hogs—brood sow; 9 shoats weighing about 50 pounds.

"Farming Implements.

"Model B. J. Deere tractor on rubber, in good condition; 2-bottom 12-in. J. Deere tractor cultivator; Model B. Internat. hammer mill, a good one; J. Deere corn binder; Superior grain and fertilizer drill; Dunham Culti-hoe; rubber tired wagon; side delivery rake; International manure spreader; 5-ft. mower; double disc; 3-sec. spring harrow; Black Hawk corn planter; horse drawn corn cultivator; Syracuse walking plow; J. Deere riding plow; weeder; dump rake; 1000 lb. barn scales; No. 3 Int. cream separator; 1½ gas engine; 2 McComb oil brooder stoves, 1 nearly new; 12x12 brooder house, nearly new; vice; anvil; log chains; forks tank heater; 6-volt wind charger; lawn mower; milk cans; and many other articles.

"Good Kalamazoo Kitchen Range.

"Lloyd W. Null, "Dale Yoder, Clerk.
"Jonas A. Miller, Auct."

1943, it was petitioners' customary practice to sell each item to the highest bidder at the auction. At that time both petitioners were advised by representatives of the Office of Price Administration that Maximum Price Regulation No. 133, fixing price ceilings for the sale of new and used farm machinery, applied to sales at auction. (No. 798, R. 107–111; No. 799, R. 111, 118.) As a result, petitioners revised their practices at the auctions. The "sale-bills" were distributed as before, and the items offered were sold to the highest bidder, unless the item was one which was subject to a price ceiling. In the latter situation, when the bidding reached the ceiling price, and, on some occasions, at an earlier point, petitioners would announce to the bidders that they would "sell a lease" of the item which had been offered for sale, and the so-called "lease" was then sold to the highest bidder. The bidding in these circumstances was in terms of a yearly rental, and the "leases" were for a term of ten years. (No. 798, R. 75, 91–92, 112–116, 118, 121–122; No. 799, R. 22–23, 30, 34–35, 76, 112–113, 117, 118, 119, 123–124.) The highest bidder was required to sign an agreement labelled "Lease of Equipment" (*infra*, pp. 10–13), and to pay at the time of the transaction a sum equal to the "rental" for ten years (No. 798, R. 22, 36, 45–46, 47, 50, 52, 56, 60, 123, 125; No. 799, R. 26, 30, 31, 37, 39, 116). The leases were furnished by pe-

titioners (No. 798, R. 119–120, 122, 123, 124, 130; No. 799, R. 113, 118).

Petitioner Miller told one "lessee" who had been summoned to appear before the grand jury, "The dumber you can act, the better you are off. Don't take these leases to court; don't show them to nobody" (No. 799, R. 59, 62). On another occasion he remarked (No. 799, R. 79), "No one pays any attention to ceiling prices." Petitioner Steiner admitted that on occasion he told the bidders that it made no difference what the duration of the lease was, whether it ran for ten, twenty, or thirty years (No. 798, R. 90, 97, 100, 117, 125–126). At one sale when reference was made to the ten year lease device, petitioner Steiner remarked, "In ten years this man may die, and the one that purchases the tractor may die, and anything may happen. The war will be over by then, and there won't be any OPA; and if I have anything to do with it, there won't be any OPA" (No. 798, R. 96, 128–129).

The "lease" which was executed in each transaction contained the same provisions, except for differences in names, amounts, and descriptions of the items involved. A sample of an executed lease provides as follows (No. 799, R. 80–81):

> Lease of Equipment
>
> The undersigned Harold Buzzard, hereinafter designated as "the lessor" has let unto the undersigned Mervin Wagner, hereinafter designated "the lessee" the

following agricultural tools, machinery and equipment:

1. The term of this lease is 10 years at an annual rental of *One Hundred twenty-two*[2] dollars, a total rental of *Twelve Hundred Twenty Dollars.* Of this amount the lessee has paid to the lessor *Twelve Hundred Twenty Dollars,* to leave a balance of *no/100 Dollars* owing on the rental for the remainder of the term. This balance shall be paid to the lessor in equal annual installments at the annual rate aforesaid, in advance, the first payment on this balance to be made on that anniversary date of this lease constituting the end of the period for which the advance rental payment has been this day paid to the lessor. If the lessee shall fail to pay the same when so due, the lessor shall resort to the deposit described in the next succeeding paragraph of this lease and draw thereon for the rental so falling due, and from year to year thereafter (in event of such continued non-payment) until the expiration of this lease.

2. The lessee has deposited with the lessor the sum of *Twelve Hundred Twenty* Dollars as security for the payment of the balance of the rentals herein called for and as security for the return, at the end of the term of this demise, of the chattels aforesaid, in as good a condition as they now are

[2] The contract was a printed form in which the blank spaces were filled in at the time of the transaction; we have italicized the information filled in.

in, in full repair and state of efficiency operability. The lessee undertakes, unconditionally and without exceptions, for himself, successors and assigns, the return of the chattels to the lessor in the condition aforesaid at the end of the demise. Provided However, in no event shall the said lessee, his heirs, executors, administrators, assigns and successors be holden to any liability for breach of this covenant or any other provision of this lease in excess of the amount of deposit for security as in this paragraph specified. Provided, Further, However, in event the deposit aforesaid or any part thereof of the advance rental payment or any part thereof is not paid in cash but evidenced by a promissory note or notes accepted by the lessor, nothing herein contained shall operate as any defense to, set off or counterclaim against or furnish any ground for postponement of the maturity date fixed by such note or notes, and such note or notes shall be collectible in accordance with their tenor, wholly apart from and without regard to any limitation of liability on the lessee as herein expressed.

3. The lessee shall list the chattels as his property for taxation and pay and discharge when due any and all taxes and other governmental excises and exactions whatsoever on account of the ownership, operation, or this bailment of the said chattels, and hereby indemnifies and agrees to hold the lessor harmless therefrom.

4. The lessee may assign this lease, or sublet the chattels, but with such assignment shall pass to the assignee's debt account security all deposits made with the lessor, and such assignee shall then, without diminution of obligation, stand in the shoes of the lessee, and likewise every subsequent sublessee and assignee thereof. Should the lessee or his assigns at any time undertake to make disposition of the chattels, the purchaser in good faith shall, notwithstanding any lack of consent on the part of the lessor, take good title thereto as against the lessor, and the lessor shall then be entitled to full appropriation of the deposit for security in like manner as on the destruction of the chattels, and any unearned rentals in the hands of the lessor shall be deemed then fully earned.

5. No guarantees, representations of warranties whatsoever are made by the lessor to the lessee in relation to the chattels hereby let, it being understood that the lessee has examined the same and knows their character and quality.

In both cases the trial judge instructed the jury that if it found "that the owner of the item agreed to or did transfer his interest in the item to a buyer for a price, then I instruct you that the instrument called a 'Lease of Equipment' involved in the transaction is not a lease, but a part of and in effect a written agreement evidencing such sale" (No. 799, R. 146; No. 798, R. 170).

ARGUMENT

Although couched in different terms, both petitions present, in substance, the same contention. Proceeding on the assumption that the transactions charged in the indictment against him were in fact leases and not sales, petitioner Steiner urges (No. 798, Pet. 2, 17–19) that the trial judge erred in instructing the jury that if the jury found that the chattels were sold, they should regard the "Lease of Equipment" contracts as contracts of sale. Making the same assumption, petitioner Miller urges (No. 799, Pet. 2, 14–15) that he has been convicted of a constructive offense, i. e., for leasing farm equipment at prices in excess of the ceiling prices for the sale of such equipment. The difficulty with petitioners' arguments is that their basic assumption is untenable. Under appropriate instructions, the juries found that they sold, not leased, the equipment at over the ceiling prices, and the court below agreed with these findings, as do we.

Regardless of what petitioners called the agreements, the character of the transactions, of course, must be judged by considering the substance of what occurred and not the mere forms in which they dealt.

Viewed in the light of actuality, there can be no serious question that petitioners were selling the substance of outright ownership, even though they purported to be selling leases. As executed

by the parties, the terms of the "Lease of Equipment" contracts (*supra*, pp. 10–13) make this evident. The so-called "lessee" was required to deposit with the "lessor" a sum equal to the total "rental" provided in the lease. The lease stipulates that the lease shall run for ten years at a specified annual rental and that the lessee has paid to the lessor the total rental for the term of the lease, leaving a balance of "no/100 dollars." If the lessee fails to pay the balance of "no/100 dollars" when due, the lessor is free to resort to the deposit and draw thereon the rental which falls due from year to year thereafter until expiration of the lease. The lessee undertakes to return the chattels at the end of the term "in as good condition as they now are in," but his liability for breach of this covenant shall not be in excess of the total rental price which was deposited with the lessor. The lessee is required to list the chattels as his property for taxation purposes and to pay and discharge all taxes when due. The lessee may assign the lease or sublet the chattels, in which event, the assignee shall "stand in the shoes of the lessee." If the lessee or his assigns dispose of the chattels, the purchaser in good faith shall, notwithstanding any lack of consent on the lessor's part, take good title against the lessor.

As a result of the contract, the transferor of the chattels, in each instance, received at the time of the transaction the total consideration which was

agreed upon by the parties. The transferee, on the other hand, took possession of the property, the power to transfer good title to a bona fide purchaser, the liability for taxes on the property, and the power to do as he saw fit with the property without any further liability to the transferor, for by the terms of the contract in no event could the lessee's liability to the lessor exceed the price which he already had paid him. As the court below concluded (No. 799, R. 192), "It is very unusual to have such provisions in a lease if it is, in fact, a lease."

In construing the contract, the trial judge was, of course, entitled to view it in the context of the circumstances under which it was made on the various occasions charged in the indictments, *Fidelity and Deposit Co.* v. *Pink,* 302 U. S. 224, 229. Those circumstances show that the "lease" plan was that of petitioners and not of the owners of the property, and that, in several instances, the persons for whom petitioners were acting as auctioneers were permanently leaving their farms for other activities and were disposing of all their farm equipment. In at least two instances the farmers were joining the armed forces (No. 798, R. 94; No. 799, R. 17); in another, the farmer was permanently forsaking farming to study for the ministry (No. 799, R. 70, 72; see also, R. 33); another sale was for a widow whose farmer-husband had recently died (No. 798, R. 37–38). These

people, as well as the others, were permanently disposing of their farming equipment with no intention or desire to retain any semblance of dominion over it or a reversionary interest in it. The "sale-bills," which announced the various auctions, were phrased in the terms of outright sales, and it is undisputed that everything not subject to price ceilings was sold without any pretext of a lease. These circumstances serve to buttress what is evident from the plain terms of the contracts. While they purported to allocate interests in the various chattels among the transferors and transferees, the parties contemplated no such result, and the contracts, in fact, transferred every significant feature of complete ownership to the transferee; in our view, in everything except its label, it was a contract of sale, and the trial judge properly so charged the jury.

In the words of the circuit court of appeals (No. 799, R. 193), "A careful examination of the 'lease' and of the evidence leaves no doubt that the transactions were a wilfull attempt upon the part of the defendants to circumvent and evade the law and regulation, that such transactions were outright sales, and not leases, and were in excess of the maximum or ceiling prices as fixed by the law and regulation. There was competent and substantial evidence to support the verdict of the jury."

CONCLUSION

Petitioners had fair trials in which the evidence abundantly demonstrated that they regularly sold farm equipment and machinery at auction at prices substantially in excess of the ceiling prices fixed by Maximum Price Regulation No. 133. The cases present no conflict of decisions or question of general importance. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946